No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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Dwelling substantially on the facts that the public school placement provided to their daughter was found by a court to be inappropriate, and that the three years she spent at Trident Academy were viewed by various witnesses and by the courts below as beneficial to her, respondents and their *amici* seek to present this case as all but decided by *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985). They characterize the issue as requiring nothing more than a routine application of a court's remedial discretion, and thus submit that a contrary decision would unduly curtail the authority of courts to address violations of the Individuals with Disabilities Education Act ("IDEA").

In all of these respects, respondents and their *amici* ignore the essential reality that in seeking to do what it deems justice on the particular facts, the court below has enunciated a rule that will severely impair the functioning of the Act as this Court has interpreted it. By deciding categorically that unilateral parental placements pursuant to *Burlington* need not fulfill the statutory requirements for a free appropriate public education ("FAPE"), including the satisfaction of state educational standards and compliance with the IEP procedures, the court below has done two things that are directly at odds with the established objectives of the statute. For that significant class of cases, it has greatly curtailed the role of state educational authorities in setting educational standards and policy, and it has rendered inapplicable the primary mechanisms by which the statute has sought to improve the quality of education for disabled children. Because those actions are at substantial odds with the purposes of the statute as enunciated by this Court, the decision of the court below should be reversed.

I. The Decision Of The Court Below Disables The Essential Machinery Of The Act Whenever Parents Elect To Withdraw Their Child From Public School Due To The State's Failure To Provide A Free Appropriate Public Education

In our opening brief (Pet. Br. 12-21), we demonstrated that the decision of the court below goes beyond what can reasonably be required under the Act. It does this by ordering public funding of private education, even though the private education at issue fails to satisfy the requirements of a FAPE.[1] At the same time, we showed that this unauthorized imposition on state and local educational agencies undermines the effective functioning of the Act for the benefit of disabled students. Pet. Br. 22-26. As a

[1] Thus, the education ordered funded here does not serve the statute's principal purpose. *Burlington*, 471 U.S. at 369 ("purpose of the Act. . . is principally to provide handicapped children with 'a free appropriate public education. . .'").

result, any time that a parent withdraws his or her child from the public school based on dissatisfaction with a placement found inappropriate by a court, the most important provisions of the Act addressed to the achievement of educational quality for that child are rendered inapplicable. Public funding of the child's private education is no longer contingent on the satisfaction of state educational standards or the use of the IEP procedure, as required for a FAPE -- the "goal" of the statute. *Honig v. Doe*, 484 U.S. 305, 308 (1988).[2] Instead, the expenditure of state and federal money is to be ordered simply on the basis that the education selected by the parents is reasonably calculated to enable the child to receive educational benefits.

In so holding, the court below has immobilized the portions of Act that are its primary means of assuring disabled students an appropriate education.[3] Those are, first, application to disabled students of the same educational standards applicable to the non-disabled, and, second, implementation of a set of procedures -- of which the IEP is the centerpiece -- in which the school and the parents are brought together to formulate and revise a plan for addressing the needs of the disabled child. *Board of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982).

[2] The court below recognized that:

> [T]he Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, *i.e.*, an education that is reasonably calculated to enable the child to receive educational benefits.

Pet. App. 17a.

[3] That requirement was directly responsive to the phenomenon observed by Congress that, prior to the Act's enactment, more than a million students were simply being excluded from the public schools entirely, and many more were being dealt with in a clearly inappropriate way. *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982).

In this way, the court below has made the statute a vehicle for "displac[ing] the primacy of States in the field of education." *Rowley*, 458 U.S. at 208. Where the state has once failed to provide an appropriate placement, parents are freed to receive public funding, including money appropriated under the Act, for educational services that do not meet minimum standards set by state educational authorities. So long as a court views the private placement as beneficial to the child, it can order restitution from public funds. Contrary to *Rowley*, 458 U.S. at 206-08, state educational policy is thus supplanted by a court's assessment of educational benefit.[4]

The same is true of the IEP requirement, which is central to the achievement of the Act's educational goals, and whose procedures are spelled out in great detail in the Act. *See Rowley*, 458 U.S. at 181-82. Notwithstanding, as all agree, that a child placed by the state in a private school must be given the benefit of the IEP process, the court held the IEP requirement inapplicable where the child is placed by the parents rather than the school authorities.[5] Public funding for this private school

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[4] Respondents mistakenly assert that "[p]etitioners have not claimed, here or below, that any lack of compliance with state standards by Trident Academy rendered Shannon's education inappropriate." Resp. Br. 20. In fact, that claim was a fundamental part of petitioner's brief. *See, e.g.*, Pet. Br. 14-15 (after noting that Trident failed to meet the standards of the state educational agency, petitioners argued that "the state's obligation under the statute is to provide a FAPE, and the placement selected by respondents is concededly not that"); Pet. Br. 17 (The goal of the Act "is not furthered by requiring public funding under the Act of an education that is not a FAPE . . . by authorizing a publicly funded special education that fails to utilize the IEP process and ignores educational standards adopted for general application throughout the State").

[5] Respondents describe the services provided by Trident in a way that suggests that it provides something close to the equivalent of the IEP process. Resp. Br. 9. They do not, however, discuss most of the essential procedural aspects of the IEP as set forth in the statute, 20

education will be allowed -- although it is not a FAPE -- so long as a court finds the placement to be of some benefit to the child. Pet. App. 17a.

This dismantling of the FAPE requirement in the cases of children placed in private schools under *Burlington* leaves in place only a provision requiring low-level judicial scrutiny of whether the education being provided is reasonably calculated to confer educational benefit. In formulating this standard for reviewing the substance of educational services being provided to disabled students -- a subject not addressed in the statute itself -- this Court was careful to note that this low level of substantive review was appropriate precisely because of the statute's heavy reliance on procedure. *Rowley*, 458 U.S. at 206. The two part inquiry announced in *Rowley* looks first to satisfaction of all required procedures,[6] and only then to the substantive question whether the IEP is "reasonably calculated to enable the child to receive educational benefits[.]" *Id.* at 206-07. Standing apart from the statute's explicit prerequisites for a FAPE, judicial review under this latter standard provides only the most limited impetus in the direction of improving the education of disabled students.

The decision of the court below thus rests on an implicit premise that parents and the private schools they select unilaterally for their children can be counted on to identify and pursue appropriate placements, without aid of the extensive procedural and other directives explicit in the requirement of a

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U.S.C. §§ 1401(a)(20), 1414(a)(5). In any event, the court below decided the case on the basis that "Trident does not attempt to comply with the terms of the Act. Trident does not, for example, develop education plans called IEPs, though it does set goals for students and revise [sic] them four times per school year." Pet. App. 11a.

[6] This procedural inquiry requires a court to satisfy itself that the State has adopted the state plan, policies, and assurances (e.g., that state educational standards be met), and has created an IEP which conforms to the provisions of 20 U.S.C. § 1401(a)(20). *Rowley*, 458 U.S. at 206 n.27.

FAPE. However, nothing in the statute offers any basis for believing that those directives, though essential where public school authorities are concerned, were somehow intended to be inapplicable when funds under the Act go to a private educational provider.

On the contrary, the statute specifically contemplates that state standards and the IEP process are to be met where private institutions provide services under the Act. Congress explicitly recognized that state agencies would utilize such providers,[7] and required that state plans provide assurance that state standard and IEP requirements will be met in those cases. 20 U.S.C. § 1413(a)(4)(B). The statute thus directly rejects the inherently implausible notion that the Act's procedural machinery is unnecessary where the educational provider is a private entity.[8]

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[7] Congress intended that the local agency would in effect become the "lead agency for assuring that educational services are appropriate for the handicapped child" when they are provided by public and private non-profit agencies being "utilized to meet the full services mandate." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1446.

[8] For reasons that were fully discussed in our opening brief (Pet. Br. 18-20), the language in § 1413(a)(4)(B) focusing on state -- but not parental -- referrals to private institutions offers no basis for inferring, as respondents suggest (Resp. Br. 25 n.17), that the requirements of a FAPE should be ignored in the context of a *Burlington* placement. Omission of that mention is explained, *inter alia*, by the fact that the possibility of *Burlington* placements was not explicitly recognized anywhere else in the statute either, and it appears that the possibility of that case arising was simply not something with which the drafters dealt. A sensible reading of the statute looks to the fact of state funding, and thus the concomitant state responsibility for the education being provided, as triggering the obligation to assure compliance with the central requirements of the Act.

II. Failure To Apply The Requirements Of The Act Cannot Be Justified By General Invocation Of The Broad Remedial Discretion Of The Courts

Both Respondents and the United States bring to their aid the unquestioned propositions that courts generally have very broad discretion in shaping equitable remedies, and that this discretion has been incorporated into the IDEA by 20 U.S.C. § 1415(e)(2). Resp Br. 31-36; U.S. Br. 10-12. They also note, as they must, this Court's observation in *Burlington*, 471 U.S. at 369, that the appropriateness of relief must be measured against the purposes of the Act. Resp. Br. 37; U.S. Br. 12. Accordingly, it is clear that the existence of broad discretion does not excuse a court from the often-difficult task of formulating remedies in a manner attentive to a broad range of considerations, most notably the purposes of the statute. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987) (considering underlying purpose of Alaska National Interest Land Conservation Act as part of analysis leading to reversal on an injunction against sale of oil and gas leases); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (considering purpose of Federal Water Pollution Control Act in reversing injunction against dumping of Navy ordnance).

Thus, this Court has stated that the remedial powers of federal courts, while "adequate to the task," are "not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Equitable relief granted based on an improper consideration of the relevant factors will be set aside by the Court. *See, e.g., Amoco Production Co.*, 480 U.S. at 545-46; *Heckler v. Day*, 467 U.S. 104, 119 (1984) (reversing an injunction imposing a deadline on determinations under the Social Security Disability program, as contrary to congressional action rejecting a proposal for such a deadline); *Romero-Barcelo*, 456 U.S. at 320.

Where an equitable remedy requires the payment of money by the government, that remedy is also bounded by "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Schweiker v. Hansen*, 450 U.S. 785, 788

(1981) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)). "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality op.).

This need for special scrutiny of remedial action is accentuated where, as here, Congress has enacted programs that incorporate state standards and rely on state implementation. In those instances, remedial measures are cabined both by congressional purpose and by fundamental federalism concerns.[9] Thus, for example, a district court's remedy that did not include valid portions of a state reapportionment plan was struck down by this Court as an unjustified disruption of state policy. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). *See also Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Whitcomb v. Chavis*, 403 U.S. at 161. In this case, the consequences of the decision below on the financial health of state educational systems and on the role of states in setting educational policy thus deserve special consideration.

This Court has explicitly addressed the issue of equitable discretion in the context of the IDEA. In *Honig v. Doe*, this Court faced the question whether the "stay-put" provision of 20 U.S.C. § 1415(e)(3) should be read to include an implicit exception allowing school authorities to remove students from their present placement for dangerous or disruptive conduct. The Court declined to read any such exception into that provision, requiring instead that it be applied in accordance with its terms. The Court thus barred any state-initiated change in the present

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[9] In fact, courts devising equitable remedies must always be mindful of inherent federalism limitations, even in the absence of legislation. "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977).

placement except upon agreement of the parents and the educational authorities. 484 U.S. at 325.

In response to the State's contention that such a result left it no means of addressing the problem of a dangerous student, the Court stated that the possibility of judicial relief nonetheless remained, since both the administrative exhaustion requirements of the Act and the "stay-put" provision itself were subject, upon a proper showing, to exception by judicial as distinguished from state agency action. The exhaustion requirements could be overcome by demonstrating to a court the futility or inadequacy of the procedures in issue. *Honig*, 484 U.S. at 327. *See Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984). The "stay-put" commandment of Section 1415(e)(3) was said to create a presumption to be overridden only by showing a substantial likelihood that injury would otherwise result. 484 U.S. at 328.

Honig thus offers a clear approach to dealing with circumstances where explicit requirements of the Act appear to be in tension with its broader purposes. Just as courts will not allow the "stay-put" provision to stand in the way of relief necessary to protect schoolchildren from serious risk of injury, they should not allow FAPE's educational standards and IEP requirement to foreclose unreasonably the pursuit of educational opportunity through the unilateral parental placement process recognized in *Burlington*. But in both cases there is a burden to be overcome before the Act's explicit directives will be ignored. That should be the burden identified in *Honig* -- of showing that compliance with the statute's express language will be futile in some sense, or that exceptional circumstances render enforced compliance inappropriate, in light of the purposes of the Act.

In most if not all cases, as in *Honig*, the showing required must rest on particular circumstances justifying exceptional treatment. Thus a parent seeking reimbursement under *Burlington*, where the private school fails to meet state educational standards or provide an IEP, should be required to show reasonable efforts to ensure compliance with those provisions, including, as appropriate, inquiries of the state

educational agencies. Failure to make all reasonable efforts to achieve compliance will be excused only in the rare case where parents can demonstrate that they failed to do so because it would have been futile.[10] The issue of what precise showing should be required is not squarely presented here, since the record is devoid of any hint that respondents made any inquiry whatever about the standing of Trident, or had any reason for believing that it would have been pointless to do so.[11] Moreover, the decision of the court below is clear in its conclusion that the state standard and IEP requirements of the Act are categorically inapplicable in the *Burlington* context, without regard to any facts peculiar to this case. Pet. App. 17a, 37a.

If one accepts that the FAPE requirement on its face purports to apply to all publicly funded education under the Act, and that its realization is, as this Court has said, the principal purpose of

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[10] They might show, for example, that no schools reasonably available to them are capable of meeting all of the state's requirements.

[11] Perhaps seeking to demonstrate, at this late date, the futility of any effort to communicate with petitioners on any of these subjects, respondents dwell at substantial length on their version of the background facts of this case, seeking to convince the Court by selective citation of the appellate court record that they have been substantially mistreated in their dealings with Petitioners. Resp. Br. 2-10.

Petitioners dispute fundamentally the severely slanted account of events which respondents have offered. The record in fact reflects a school district that endeavored to create an educational program for Shannon Carter when her needs became known. The school district responded to parental requests by providing testing, guidance counseling, and an education plan in the form of a proposed IEP. The school district worked closely with the parents to incorporate in the IEP their judgments, as well as the judgments of the counselor hired by the parents. As it turned out, that plan, arrived at cooperatively between the parents and the school authorities, was found by the district court -- after the fact -- to be inappropriate. At the same time, the district court rejected the claim of procedural non-compliance on the part of the school district. Pet. App. 35a.

the Act, *Burlington*, 471 U.S. at 369, this departure from that requirement cannot be justified as a matter of equitable discretion under *Honig*. The simple fact that parents decide to remove their child from the public school based on a disagreement with school authorities about the then-existing placement does not in itself suggest that the requirements of a FAPE cannot realistically be met.[12] Nor is it true, as respondents suggest, that the requirements of a FAPE cannot "logically be applied" where the parents and not the school district place the child in the private school. Resp. Br. 28-31.[13]

More specifically, no sound reason appears why parents desiring to make a unilateral private school placement at public expense cannot in most cases be held to the requirement of Section 1401(a)(18)(B) that the school they select "meet the standards of the State educational agency." It is little enough to ask of parents seeking public funding that they do what respondents here distinctly failed to do -- make some inquiry of school authorities as to whether the institution they have in mind meets state standards.[14] Contrary to respondents' assertion

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[12] State cooperation with parents asserting their rights established under *Burlington* is a far cry from the issue actually presented in *Burlington*, 471 U.S. at 372, and referenced by the United States, Br. at 9, where the Court noted that school officials who disagreed with the parents' desire for a private placement were unlikely to agree to a departure from the "stay-put" provision. Unlike the officials who in that context might have declined to agree to move the child, state officials now refusing to cooperate with the parents seeking to move their child would do so in spite of the parents' clear right under *Burlington*.

[13] The requirements of 20 U.S.C. § 1401(a)(18)(A) and (C) that the education be provided "at public expense" and "without charge," and that it "include an appropriate preschool, elementary, or secondary school education in the State involved," will be fulfilled where the state pays for an education that meets the remaining criteria of a FAPE.

[14] Respondents seek to predict, based on a general reference to South Carolina regulations, S.C. Code Regs. 43-243(E), that they would have received no answer had they inquired whether Trident met state

(Resp. Br. 22-23), it is not at all unrealistic to expect that state authorities would assist parents by providing them with that information, aware as they are of the parents' right under *Burlington* to elect unilaterally to remove their child from the public school.[15] The mere possibility that some school authorities may be uncooperative hardly supports a rule of law that simply eliminates the requirement of compliance with state educational standards. Ignoring that requirement is justified only upon a showing that inquiries aimed at achieving that end will be futile or otherwise disruptive of the purposes of the Act. Requiring such a showing will hardly have the effect of "eliminating *Burlington* as a viable remedy" in South Carolina or anywhere

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standards, since "no process exists by which they may apply to the state for such a determination." Resp. Br. 8, 22-23. The absence of any articulated regulatory procedure, however, does not foreclose a simple inquiry, by telephone or in person, which might have elicited an answer based on existing knowledge, or might have resulted in an investigation by school authorities to determine whether the relevant standards were met. In any event, none of these issues was considered below, since respondents never argued that their failure to make any inquiry was based upon its anticipated futility, and the court below concluded that, in the *Burlington* context, parents simply have no obligation to see that state standards are met. Pet. App. 17a.

[15] However a particular state addresses inquiries concerning private school compliance with state educational standards, in each instance the process must begin with a parental inquiry seeking information on the compliance of one or more private schools with state educational standards. In that sense, the distinction offered by the United States, Br. at 25, between this case and those in which "parents have ready access to information" -- as where a list is maintained -- is illusory. *See* Brief *Amicus Curiae* of The National Alliance for the Mentally Ill, The Bazelon Center for Mental Health Law, The National Association of Protection and Advocacy Systems, and the Maryland Disability Law Center in Support of Respondents, at 6 ("Even if a State maintains a list of approved schools, parents are often unaware of its existence. The school district possesses all the information about whether a private school has been State-approved.")

else. Resp. Br. 23. On the contrary, it will render more likely the possibility that the resulting publicly-funded placements will better advance the purposes of the Act by more often conforming to the existing state standards.[16]

Similarly, the Section 1401(a)(18)(D) requirement, that education and related services be "provided in conformity with that [IEP] required under § 1414(a)(5)," likewise can be satisfied where a child is in private school, even when the placement is made in response to an allegedly deficient educational plan. Resp. Br. 29. The Act itself requires that state plans assure that where the state refers the child outside the public school, those "children with disabilities in private schools and facilities . . . be provided special education and related services (in conformance with an individualized education program as required by this subchapter)." 20 U.S.C. § 1413(a)(4)(B)(i). Nothing in the record suggests that public school officials do not participate in an IEP under these circumstances, and there appears no reason why they could not participate to some extent in the case of *Burlington* placements as well. Even if that is not practical in a particular case, the private school, working with the parents, can still fulfill the remaining explicit provisions of the IEP requirement. 20 U.S.C. § 1414(a)(5).

Accordingly, there is nothing about the circumstances of a unilateral parental placement that necessarily frustrates the realization of the statute's goal of a FAPE for every disabled child. While cases may arise where the achievement of state

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[16] Although the issue has not played a part in the litigation of this case, no reason appears as to why the fact of a *Burlington* placement necessarily, and in every case, forecloses realization of the requirement of § 1401(a)(18)(A) that the educational services be provided "under public supervision and direction." Resp. Br. 29. While there may be cases where animosity or uncooperativeness of school authorities render any supervisory role impractical or disruptive, one cannot assume that this will usually be so. In any event, one form of supervision that will generally be possible is the adherence to state standards in the education that is being provided.

standards or of the IEP requirement in a private school setting may be impractical, that is no reason to rewrite the statute to eliminate its principal goal of achieving a FAPE for every child in all *Burlington* placements. Absent a showing of reasonable effort by the parents to achieve that compliance with the statute, and of particular circumstances justifying the parents' assertion that such effort would be futile or that compliance is impractical, there is no basis for a judicial order of funding under the Act for an education that does not provide a FAPE. Because no such showing was undertaken here, and because the court below made clear that it was unnecessary, the decision below must be set aside. The broad remedial discretion of the federal courts is no talisman, somehow justifying decisions that override the core purposes of legislative enactments.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' Opening Brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

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